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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 539

CLARENCE O. CRAVEN,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE E. ALLEN,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 539

CLARENCE O. CRAVEN,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Clarence O. Craven respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on the 9th day of November, 1950.

A

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254. The decision of the

United States Court of Appeals for the Fourth Circuit was rendered on the 9th day of November, 1950.

B

Summary Statement of Matter Involved

Petitioner lost his leg while employed by the Atlantic Coast Line Railroad Company. He brought suit for damages under the Federal Employers' Liability Act, in the United States District Court for the Eastern District of Virginia. The case was submitted to a jury which returned a verdict for the plaintiff in the sum of $28,000.00.

At the conclusion of the plaintiff's evidence, the defendant moved for a dismissal upon the ground that the evidence failed to show that the defendant was engaged in interstate commerce, and for a directed verdict upon the ground, (1) that there was no evidence from which the jury could infer negligence on the part of the railroad and (2) that there was no evidence from which the jury could infer causal connection. The court overruled the motion to dismiss and reserved judgment upon the motion for directed verdict. After verdict, the defendant moved for judgment notwithstanding the verdict upon the same grounds as assigned for its previous motions. The defendant also moved for a new trial for errors in the charge which are not material for the purposes of this petition. The Trial Court, after mature consideration, overruled the several motions of the defendant and entered judgment for the plaintiff. Upon appeal by the defendant, the United States Court of Appeals for the Fourth Circuit reversed the District Court for the Eastern District of Virginia, set aside the verdict of the jury, and directed that judgment be entered for the defendant upon the *sole* ground that the verdict of the jury was without "substantial" evidence to support it. Specifically the court held (1) that there was no "substantial" evidence

of primary negligence (2) that reasonable men could not differ as to plaintiff's contributory negligence, and that he was therefore guilty of contributory negligence as a matter of law, and (3) that the *sole* cause of the plaintiff's injury was his own negligence. Opinion rendered on November 9, 1950. *ACL R. Co.* v. *Craven,* 185 F. 2nd C. A. VA p. 176.

C

Question Presented

The sole question presented is whether the United States Court of Appeals for the Fourth Circuit has deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial, by weighing contradictory evidence, by judging the credibility of witnesses, by requiring proof by expert opinion evidence when none was required as a matter of law, by rejecting reasonable inferences drawn by the jury from the evidence, and by substituting therefor inferences, some of which are unsupported by evidence, contrary to the jury verdict, and by drawing ultimate conclusions as to the facts contrary to those drawn by the jury upon issues of primary negligence, contributory negligence and cause and effect.

D

Reasons Relied On for Allowance of Writ

1. The United States Court of Appeals for the Fourth Circuit has rendered a decision in probable conflict with applicable decisions of the Supreme Court of the United States involving the right of petitioner to a trial by jury under the Federal Employers' Liability Act.

A supporting brief accompanies this petition.

WHEREFORE, your petitioner prays that a writ of certiorari issue to review the judgment of the United States

Court of Appeals for the Fourth Circuit entered by that court on the 9th day of November, 1950, and that the said judgment be reversed by this Honorable Court, and that the judgment entered in the United States District Court, upon the verdict of the jury be reinstated by this Honorable Court.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 539

CLARENCE O. CRAVEN,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION,

Defendant

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of Virginia, sustaining the verdict of the jury is set forth in a letter to counsel, and is found at pages 43, 44 and 45 of the Record. The opinion of the United States Court of Appeals for the Fourth Circuit is found at page 132 through 139 of the Record. *ACLR Co.* v. *Craven*, 185 F. 2nd C. A. VA, p. 176.

II

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254, this action having been instituted under the Federal Employers' Liability Act. The judgment of the United States Court of Appeals for the Fourth Circuit to be reviewed was entered on November 9, 1950 (R. p. 140).

III

Statement of the Case

A statement of the case appears under heading "B" of the petition for the writ of certiorari. In the interest of brevity, this statement is not here repeated, but is referred to with the request that it be considered as incorporated herein by reference.

IV

Question Presented

The question specifically brought forward by the petition for a writ of certiorari appears under the heading "C" of the petition. Again the statement is not here repeated in the interest of brevity, but is referred to with the request that it be considered incorporated by reference.

V

Summary of Argument

The right to trial by jury is a basic and fundamental feature of our system of Federal jurisprudence. This Honorable Court has given vitality to the intention of the Congress underlying the enactment of the Federal Employers' Liability Act by holding, in unmistakable language, that the right of trial by jury in these cases is part and

parcel of the remedy afforded railroad workers under the act. Reasonable care and cause and effect are as illusive here as in other fields. The jury has been chosen as the appropriate tribunal to apply those standards to the facts in personal injury cases. It is the system which the Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. Only where there is a complete absence of probative facts to support the conclusion reached, does a reversible error appear. The appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

The trial court, following these principles so clearly announced in the opinions of this Honorable Court, submitted to the jury the issues of primary negligence, contributory negligence and cause and effect in simple and fair language to which there was no objection or exception. After the jury returned its verdict for the plaintiff, the trial court received briefs, heard oral argument, and thereafter having maturely considered the questions raised, rendered its opinion sustaining the verdict of the jury, again following the clear and simple principles announced by this Honorable Court.

Upon appeal, the United States Court of Appeals for the Fourth Circuit, failed to give effect to the holdings of this Honorable Court in reversing the verdict of the jury and the action of the trial judge.

In its opinion, the United States Court of Appeals for the Fourth Circuit could not say that there was not evidence before the jury, which, if believed, would support the verdict. Rather, the court seems to frankly concede that there was such evidence, but holds that the evidence of negligence was not "substantial" enough to satisfy the

court, for it uses the following language: "This case must be reversed because there is no *substantial* evidence upon which the question of negligence could have been submitted to the jury." (Emphasis added) (R. p. 135).

While apparently admitting that there was danger of injury, and that the defendant knew of this danger and could have taken measures which would have prevented the injury, the court nonetheless says, (R. p. 136 & 137) "* * * and a railroad is not necessarily required to employ the latest or safest devices. * * *. We do not see how ordinary prudence could have required the construction of a bridge or a tunnel or the disruption of the railroad's activities, suggested by the plaintiff. (There were other simple and effective remedies available, as will be demonstrated hereafter.) That remedy would have been all out of proportion to the risk involved." (Matter in parentheses added).

As will be hereinafter pointed out, if the jury believed the evidence before it, most favorable to the plaintiff and fairly applied that evidence under the charge of the trial court upon the subjects of primary negligence, contributory negligence and cause and effect (to which portion of the charge, no exception was made) it becomes apparent that the jury was compelled to find for the plaintiff and the Court of Appeals committed error in reversing those findings of the jury.

VI

ARGUMENT

a. *Narrative Outline of Facts*

The parties will be referred to herein as the plaintiff and defendant in the respective positions occupied in the Trial Court.

The plaintiff, Clarence O. Craven, while employed as a brakeman of the Atlantic Coast Line Railroad Company, lost his left leg in the yards of the said company at South Rocky Mount, North Carolina. The company maintains at South Rocky Mount very extensive yards, being approximately three miles in length, and its division round house, shops and other repair facilities. Engines are serviced and operation crews of all trains are changed at this terminal point.

The plaintiff left Richmond, Virginia at 2:17 A.M. on March 18th as brakeman for extra freight No. 1523 under Conductor J. I. Sargent under whom he customarily worked. He arrived at the "CO Office" in the Rocky Mount yards at 12:15 P.M. The conductor got off the train at this point. The engine was detached from the cars, and the plaintiff, in accordance with his duties, assisted in taking the engine to the hostler's yard.

The compensation of the plaintiff ceased when he left the engine. However, he had certain additional duties connected with his employment which he was required to perform upon his own time, and without additional compensation. First, he was required to report to his conductor the time at which he left his engine, R. p. 52. This was necessary because the conductor was required to turn in time reports from which the compensation of the brakeman was ascertained and paid. (R. p. 52). Second, he was required to see that his name and address was properly entered on the register kept for that purpose. (R. p. 56, 69 & 70). Third, it was contemplated that he should wash himself and change his dirty, greasy clothing before going on the public streets and to his rooming place. This latter was customarily done by the plaintiff and other trainmen in the wash room provided by the defendant immediately adjacent to the "CO Office". (R. p. 68).

The building known in this record as the "CO Office" was the nerve center of these yards. Here the register books for train crews were kept. (R. p. 69 & 72). The telegraph operator was here. (R. p. 53, 86 & 96). The yard master maintained his office here, (R. p. 72 & 86), and to this place came the train crews of incoming trains to register off duty and the crews of outgoing trains to receive their instructions and assignments. (R. p. 96). Here were maintained wash rooms for all trainmen, and at this point the company operated a restaurant which was patronized by trainmen and other employees and, to such extent as the company was able to induce them, by the public generally. (R. p. 68, 72, 73 & 94).

In order that the court may better visualize the conditions obtaining at this point, we reproduce here a photostat of an aerial photograph offered by the plaintiff as Exhibit No. 3. (Reporter's Transcript, p. 67 & 71).

The bottom of this photostat is generally North. The round house is easily located in the left foreground. The hostler's yard is those tracks leading to the round house from the South. To the West of the hostler's yard is seen a group of buildings. These are the "CO Office", wash rooms, restaurant, telegraph operator's office and yard master's office. Immediately in front of these buildings, and a little further West are a series of tracks. There are, in all, five (5) of these tracks. However, the two (2) tracks furthest West do not show on the photostatic reproduction of the photograph. The track nearest the buildings or the eastern track is known as the "yard lead" track. The next two (2) tracks are the main line North and South tracks. The next two (2) tracks to the West, which cannot be distinguished, are said to be used as storage tracks. To the West of these five (5) tracks and abutting immediately against the right-of-way of the railroad company is Main Street of South Rocky Mount. Along the Western side of this street are located restaurants, confectioneries and other business establishments. We have marked on the photograph in *red* the walk-way leading from the "CO Office" on the West to the street on the east. This red strip is a built-up walk-way made of sand screening or a bituminous substance and leads from the street on the West across the five (5) tracks to the entrance of the "CO Office" and other establishments on the East. The location and use to which this walk-way was put constitutes one charge of negligence.

The plaintiff, after leaving his engine in the hostler's yard, went a short distance North to a gate in a board fence which separates the hostler's yard from the "CO Office" and other buildings. Passing through this gate he turned South and went along the eastern side of the "yard lead" track to the "CO Office" where he customarily found

his conductor about one-half of the time. (R. p. 19). Not finding the conductor there, he crossed over the walk-way to the street on the West where he customarily found the conductor the other one-half the time (R. p. 19). Not finding his conductor on the street or in the restaurants, the plaintiff returned across the same walk-way. His purpose in returning was to wash up and change his dirty clothing, to check the register and to report to his conductor should he meet him on the return trip in the "CO Office" or the wash room (R. p. 71, 77, 79, 23 & 24).

When the plaintiff arrived at the "yard lead" track used for the purpose of classifying cars in the yard lying to the South, he found his passage blocked by a long "cut" of cars which was moving North very slowly. Concluding that this "cut" of cars was to be classified in the yards to the South, and that his way would be obstructed for a long period of time, the plaintiff stepped up on a gondola car and thence to the brake step on the South end thereof, with the intention of stepping southward to a flat car and thence across the "cut" of cars to the "CO Office" and wash room. When he attempted to step with his right leg, something caught in his left trouser leg and held his left foot fast upon the brake step, causing him to fall between the two cars, and the West front or Northern wheel of the flat car ran over his left leg.

The foregoing is the barest outline of the essential narrative. Where there is contradiction in the record, page reference is made to support the statement given.

b. *The Negligence Charged*

The negligence charged against the defendant falls into three (3) general classifications: One, that the defendant was negligent with respect to the walk-way provided its employees; two, that the defendant was negligent with

respect to the condition of the brake step of the gondola car; and, three, that the defendant was negligent with respect to the conditions under which the plaintiff was required to search for the conductor in order to make his time report. Under these three broad, general topics, we will discuss the evidence of the defendant's negligence.

The court's charge to the jury is of considerable importance since it is the standard by which the negligence in this case must be measured. The charge contains a correct statement of the legal principles applicable, and no exception being taken thereto, it becomes binding upon both the plaintiff and the defendant for the purposes of this appeal. *United States* v. *Atkinson,* 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555. The portions thereof relevant to the negligence of the defendant are here set forth:

> "In this case, as in all other jury cases, personal injury cases, the burden of proving negligence is upon the plaintiff. The mere fact that an accident has occurred and the plaintiff was injured creates no presumption that such injury was caused by the negligence of the defendant but such negligence must be shown from the evidence. You are told that negligence may be defined as the want of ordinary care or the failure to do what a person of ordinary care would do in the circumstances, or the doing of an act which a person of ordinary prudence or care would not do under like circumstances. In determining whether a person used reasonable care or acted reasonably, the test is whether such person acted in a manner that one of ordinary prudence, similarly situated, would have acted under similar circumstances. That is the test, what a person of ordinary prudence and caution would do under like circumstances" (R. p. 35).
>
> "Gentlemen, the defendant railroad company owed to the plaintiff at the time of the accident a duty to provide for the plaintiff and for other employees a safe place to work and to perform his duties. It owed

a safe passageway over the premises to and from the plaintiff's place of work. There was a duty upon the company to use reasonable care not to subject the plaintiff and other employees to extra-hazardous conditions and dangers in coming to and going from his place of work and there was a duty likewise upon the company to take all reasonable precautions not to unnecessarily expose the plaintiff to danger, and to exercise care commensurate with the danger existing at the place provided by the defendant railroad for the plaintiff and other employees to go to and from work.

The defendant also owed the plaintiff the duty to promulgate and enforce reasonable rules and regulations for the safety of the plaintiff and other employees in the discharge of their duties.

If you believe from the evidence that the defendant at the time and place set out in the evidence failed to perform any one or more of those duties which I have enumerated, which were imposed upon it by law, then the defendant was guilty of negligence. If you believe the defendant was guilty of negligence as here defined and you further believe from the evidence that the injuries of the plaintiff resulted in whole or in part from such negligence, then your verdict should be for the plaintiff in such amount as you may deem proper as measured by the rule which I shall announce in a few moments" (R. p. 38).

The duties set forth in the foregoing instructions are the common law duties long recognized as the employer's obligation to his employees. *Bailey* v. *Central Vermont R. Company,* 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

The duty to provide a safe place of work includes a safe entrance and exit to and from the place of work. See 35 Am. Jur., Master and Servant, Sec. 173 & 185.

This court has repeatedly held that the Master is liable for injuries "attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances" and if he "knew or by the exer-

cise of due care should have known that prevalent standards of conduct were inadequate to protect petitioner and similarly situated employees." *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Wilkerson* v. *McCarthy,* 336 U. S. 453, 93 L. Ed. 497, 69 S. Ct. 413; *Urie* v. *Thompson,* 337 U. S. 163, 93 L. Ed. 1287. These holdings constitute no new departure. They follow strictly the common law. See 35 Am. Jur., Master and Servant, Sec. 127.

The petitioner will show that the defendant installed a walk-way for its employees across its yards at an exceedingly dangerous place where it would be continuously obstructed by the movement of trains and cars; that its employees, when their passage was obstructed, were in the habit of crossing moving cuts of cars at this point; that the defendant knew of this conduct and took no effective measures to put a stop to this practice, or to eliminate its cause.

If this evidence sustains these factual allegations, then under the charge of the court the jury verdict is sustained, and the circuit court committed error.

Let us examine the evidence as to this walk-way.

c. *Negligence With Respect to the Walk-way*

The answers to interrogatories (R. p. 128, 129 and 130) give important factual information bearing upon the extent of the use of this walk-way and the heavy movement of cars along the "lead track". The answer to interrogatory No. 9 (R. p. 128) shows an average of 135 trains every 24 hours, in and out of these yards. When we consider that for each of these trains at least five (5) crewmen reported "off duty" to the "CO Office", and at least five (5) new trainmen reported "on duty", we get a total of 1350 trainmen every 24 hours going to or leaving the "CO Office". There

were between 75 and 100 employees on duty in the repair shops and other installations of the defendant at the time of this accident (R. p. 130). There were others, the number not shown by the evidence (R. pp. 43 thru 48, 64 & 130). The defendant operated a public restaurant in this "CO Office" and invited members of the public generally to cross this walk to its restaurant. No other walk-way was provided by the defendant for its employees or others to come and go from the "CO Office", the division round house shops and other facilities (R. p. 97). One crossing from Main Street to any point in the yards of the defendant had no other means of crossing, provided by the defendant, for a distance of one quarter mile to the North and three miles to the South (R. pp. 92 & 93). That great numbers of its employees and others crossed back and forth from the street on the West to the installations on the East is clearly shown by the evidence, and is not contradicted (R. pp. 92 thru 98).

So much for the use to which the walk-way was put. Now let us see to what extent this walk-way was surrounded with danger.

We have referred to the fact that an average of 135 trains each 24 hours or approximately 1 train every 10 minutes passed in or out of these yards. Obviously, the two main line tracks across which this walk-way passed were very busy, but there was a greater peril to those using the walk-way. A glance at the photograph reproduced as a part of this brief shows that this walk-way was located at the very mouth of the classification yards to the South thereof. The "yard lead" track was used for the purpose of classifying cars, an operation in which "cuts" or cars, estimated in the evidence to consist of 18 to 35 cars, were moved back and forth over the "lead track" for the purpose of placing the cars into the various side tracks entered to the South from

the "lead track" (R. p. 98). The evidence further shows that some 1500 cars were moved in this way over the "lead track" every 24 hours (R. pp. 120, 123, 129 & 99). This activity necessarily resulted in this "lead track" being in almost continuous use. The yard master testified that the number of cars composing the "cuts" of cars thus classified did not exceed 20 cars per "cut" (R. p. 106). If 1500 were classified each 24 hours with 20 cars to a "cut", this would require 75 separate "cuts" of cars to be moved in this way over the "lead track", one "cut" of 20 cars every 20 minutes. The evidence further shows that these cars would average 40 feet each. A "cut" of 20 cars would be approximately 800 feet in length. It therefore follows that these classification movements necessarily resulted in the obstruction of this walk-way almost continuously. The jury had the right to so conclude. In addition, there were straight movements of long "cuts" of cars consisting of 70 or more cars which blocked this walk-way for 15 or 20 minutes (R. p. 105). Numerous witnesses testified in regard to the obstruction which thus resulted to the walk-way. It was frequently and continuously blocked for periods of time estimated at from 5 to 20 minutes, and sometimes for longer periods, depending upon how many switching movements had to be made (R. pp. 54, 59, 62, 77, 103 thru 106).

The plaintiff charged that the defendant violated its duty to use reasonable care, to provide its employees a reasonably safe passageway across its premises to their place of work, and that this walk-way, thus located, unnecessarily exposed employees to extra hazard and peril. A glance at the photographs and the plats plainly shows that the further North the walk-way was located the less it would be obstructed (Exhibit No. 3 & Reporter's Tr. pp. 67 & 71). For the further North the walk-way, the shorter the distance southward the "cuts" of cars would have to move

in order to clear the walk-way. There is nothing in this record which shows that this long and continuous obstruction could not have been effectively eliminated by moving the walk-way to the North.

It would be expected that the employer, in selecting the place at which it would provide the only passage for its employees, would give some consideration to the perils surrounding the place, and to the extensive use to be made of the walk-way. Once installed, employees were under a duty to follow the route provided by the employer. If they took a different route, they would not be acting within the scope of their employment, and in violation of the implied instruction of the employer. This record does not show that it was either necessary or that the business of the employer would even be promoted by locating the only walk-way provided for its employees at this most dangerous place. Apparently, no consideration was given to the safety of those who would be required to use it. The only reason given for its location at this point is found in the testimony of the yard master who represented the defendant in making this important decision. We quote his testimony: (R. pp. 84 & 85).

> Q. "Do you know who put that pathway in and when?
>
> A. I do not know the exact date, but it was one of the first things I did after being made General Yardmaster was to build this roadway across there because we had girls in the office and the track was always muddy. That was one of the first things I did and therefore I would say it was done the early part of December, 1942.
>
> Q. Was there any pathway across here as shown in this picture when you became General Yardmaster?
>
> A. No, sir, there was not.
>
> Q. And you then built the pathway out of sand screenings?
>
> A. Yes, sir."

This is the only reason given by the defendant for the location of this walkway at this most dangerous place. Apparently, no consideration was given to the great danger to which employees were thus exposed. It is difficult to see how a jury could have found that such an important decision involving the safety of so many employees was made with ordinary prudence when the sole reason given for the act is of such a casual and even sentimental nature. It would seem apparent that the jury had the right to conclude that this kind of judgment does not constitute reasonable care under the circumstances.

No action at all would have been better, for then an employee would have been conscious of his own privilege to cross over from the street to the "CO Office" at a place of his own selection rather than at this dangerous place. When the company took affirmative action and constructed this passage way, this freedom of choice was effectively eliminated, for it then became the duty of the employee to follow the route provided by the employer. See 35 Am. Jur., Sec. 173. The construction of this passage in effect "funneled" in this danger spot great numbers of people.

This action was negligence, not only because of the general hazards with which the way was surrounded, but specifically because in the exercise of ordinary care the employer should have foreseen or anticipated that its employees, under the stimulus of long obstruction of their passage, would, from time to time, climb over these slowly moving "cuts" of cars and thereby be injured. It is submitted that this was a jury issue, and its verdict should be sustained.

But they say plaintiff still has not proven negligence because the defendant, even though he provided an obstructed and dangerous walk-way, could not in the exercise of ordi-

nary prudence foresee that some employee whose way was blocked might attempt to cross these "cuts" of cars and be seriously injured or killed. The complete answer to this is fully established in this record. Every witness who testified upon this subject had seen men cross over these slowly moving "cuts" of cars obstructing their passage. (R. pp. 53, 54, 55, 58, 59, 62, 63 & 74).

E. I. Stewart, a passenger train conductor, testified: (R. p. 53).

Direct

Q. "Mr. Stewart, have you in going back and forth to the C. O. Office there at South Rocky Mount ever had your passage blocked by a cut of cars on the yard lead track, shifting and classifying cars there?

A. Yes.

Q. Is that a frequent or infrequent occur-ence?

A. Well, I would say with the work they have to do, it is frequent.

Q. What provision is made by the railroad company when a man, a trainman or conductor, has to report at the C. O. office to get his train orders for a train that is leaving when he is delayed by an obstruction, by one of these freight trains classifying cars there?

A. What provision is made by the company?

A. I don't know that there is any. He has to get there, if he can.

Q. Have you, Mr. Stewart, seen persons passing from the street at South Rocky Mount over to the C. O. Office, the telegraph office, the washroom and the restaurant—have you seen persons, passing across there, when their passageway was blocked by one of these slow moving freight trains, climb over and through the train?

A. I think I have, yes. I know I have."

Cross Examination, (R. pp. 54 & 55).

Q. "What is the usual practice among these employees? Do they, if the passageway be blocked by a

moving cut of cars, wait or is it the usual practice to wait until the passageway is open and then cross or is the usual practice to swing on cars and go on through?

A. Are you ready for me to answer?

Q. Yes.

A. I have seen them climb over the cars and I have seen them wait.

Q. Which do most of the men do?

A. Wait.

Q. Would it be accurate to say occasionally a man crawls over a car? I am trying to get what is the general rule.

A. I didn't get that question.

Q. Do men frequently climb over cars or occasionally climb over cars? What is the general rule?

A. I would say occasionally.

Q. It just happens every now and then?

A. Yes."

D. E. Farrow, conductor of defendant testified: (R. p. 58)

Direct

Q. "Are you familiar with that cross-walk and the condition there in South Rocky Mount going from the street over to the C. O. Office?

A. Very much so.

Q. Have you in going back and forth to the C. O. Office to the street or to your place where you room ever had your passageway blocked by these classifying cars?

A. Yes, sir.

Q. Is that a frequent or an infrequent occurrence?

A. Well, it is, I would say, very frequent.

Q. For what period of time would you say that those trains classifying cars there on an average would block a man's passage back and forth?

A. You can't say on an average because sometimes a yard engine may pull fifty cars out of there and throw one car out and shove the other forty-nine back which wouldn't be more than ten minutes and then again he

can take fifty cars out and have to shift one at a time which would take thirty-five or forty minutes maybe. It depends on the amount of switching there is to do with the cut of cars that he is holding."

Redirect Examination (R. p. 59).

Q. "Mr. Farrow, have you observed persons climbing over and through a cut of cars on that lead track?

A. Yes.

Q. Have you observed persons climbing through and over these trains?

A. Yes.

Q. Is that a thing that happens with sufficient frequency to be a thing that is generally to be observed there?

A. You can't say frequently, but I have seen employees and pedestrians which practically, I would say, had no business over there at all—I have seen both of them climb over."

Robert E. Whitehead, conductor, testified: (R. pp. 62 & 63).

Cross Examination.

Q. "You have testified to the fact that you have seen this passageway blocked at times?

A. Yes.

Q. Do men desiring to cross from Main Street to the yard office, and finding that passageway blocked, make it a practice to climb through a moving cut of cars or do they wait for the passageway to become clear in most instances?

A. In most instances they wait for it to become clear.

Q. Have you seen men cross?

A. Occasionally, yes.

Q. It doesn't happen often? I believe you used the word "occasionally"?

A. Yes."

E. H. Stancil, yard master, at an unguarded moment in his testimony characterized this as a "habit" which he says he attempted to discourage. At R. pp. 30 and 31, after testifying that he had seen men do what the plaintiff attempted to do in this case, and that he always cautioned the man whom he saw do such a thing, the yard master made the following statement:

> Q. "Why have you done so?
>
> A. Because of violation of all safety principles, and we just don't want it done. It is a habit that we want to discourage.
>
> We don't say anything to the man if he stays on the other side even though his duties are on the opposite side from where he is at. He is perfectly privileged to wait there until such time as he can cross in a safe manner."

And further, upon cross examination, the same witness testified as follows: (R. pp. 102 & 103).

> Q. "You say you tried to discourage the habit that exists there among these men of climbing over these cars?
>
> A. That is correct.
>
> Q. Have you made a more vigorous effort to try to discourage it since this accident than you did before this accident?
>
> A. I didn't have so much time before this accident because I had nobody in this location.
>
> Q. You hadn't been doing much to discourage it until after this accident?
>
> A. You don't have to do much because it is very seldom that you see anybody crawl over a moving train. It wouldn't take much effort.
>
> Q. I understood you to say it was a habit that you were trying to discourage.
>
> A. No, I didn't say it was a habit. I said it was occasionally done.

Q. You said you tried to discourage that habit. I listened very carefully.

A. It would be a habit if a man would do it one time."

The plaintiff testified as to why he stepped up on this train which was moving about as fast as a man could walk, at R. p. 74:

Q. "All right. Now, what did you do when you were confronted with that situation?

A. Well, it was every day habit for me to climb up on moving trains and I didn't think anything about it, stepping up on another moving train, and I have seen other people cross over those moving trains there and I had been on duty and I was tired and I didn't want to keep standing there and losing my rest period, the time waiting for them to clear up the track, and figured I could step up on this here train * * *."

With this evidence before it, The Trial Court, in its opinion (R. p. 44) held as follows:

"There was testimony to the effect that other employees, from time to time, crossed moving trains at this location, and that such practice was known to the defendant. The jury might properly believe that the failure of the defendant to put a stop to this practice constituted negligence."

The Court of Appeals in reversing this holding of the Trial Court, among other things, says that the only remedy available to the company required "a complete rearrangement of the yard, a bridge or a tunnel, or some system of traffic regulation."

With all due deference to the opinion of the Circuit Court, we here point out remedies available which required no such extensive measures.

First, the simplest thing to have done when the company became aware of the practice of its employees to cross

these "cuts" of cars when their passage was obstructed at this point would have been to move the walk-way further North. The yard master testified the "cuts" of cars classified were only 20 cars in length or approximately 800 feet (R. p. 106). The further North it was moved, the less it would have been obstructed. This, the jury had the right to conclude from an examination of the aerial photographs submitted in evidence and from the plats. So far as we have been able to find, there is no evidence in this record that such a solution would not have eliminated the hazard, and it is obvious that it would have relieved the hazard to a great extent.

Second, the company could have constructed a fence along its right-of-way where it abuts the street and thus prevented these great numbers of persons from crossing its right-of-way at this extremely hazardous place. (See Photograph Defendant's Exhibit No. B.) It is respectfully submitted that the jury, as men of ordinary intelligence, had the right so to conclude from an examination of the photographs and the plats.

Third, the court's charge and the common law require the defendant to promulgate and enforce reasonable rules and regulations for the safety of its employees. The fact that the yard master states that he warned employees whom he saw crossing these moving "cuts" of cars shows clearly that the defendant recognized its obligation to control or prevent such conduct of its employees. With the affirmative knowledge that employees were crossing these slowly moving "cuts" of cars, it would have been a most simple and inexpensive measure for the defendant to have promulgated and published a rule forbidding its employees to cross these "cuts" of cars when their passage was blocked. If even this had been done the plaintiff's injury would probably have been prevented, for he was a willing and

conscientious employee (R. p. 64). It is respectfully submitted that the jury had the right to conclude that the failure of the defendant to take this simple precaution constituted negligence.

Fourth, the Court of Appeals, in its opinion, recognizes the fact that this injury could have been prevented by the construction of an overhead foot path or some similar method of passage. The court then holds that "a railroad is not necessarily required to employ the latest or safest devices (Citing cases). We do not see how ordinary prudence could have required the construction of a bridge or a tunnel or the disruption of the railroad's activities, suggested by the plaintiff. That remedy would have been all out of proportion to the risk involved."

The plaintiff respectfully submits that the jury had the right to find, under the evidence in this case, (1) that this walk-way was used by great numbers of employees of the defendant, not only by invitation of the defendant, but by reason of their obligation to follow the route provided by the defendant; (2) that the walk-way was located in a place where employees were exposed to great peril; and (3) that because of the obstruction and (4) with the affirmative knowledge of the employer, they were climbing over moving "cuts" of cars habitually. Whether an overpass was a reasonable requirement, it is submitted, was eminently a question for the determination of the jury under the facts. *There is not one word of evidence offered by the defendant which shows that an overhead foot path could not have been constructed at a reasonable cost, or that for any other reason the construction of such a foot path was either impractical or out of proportion to the risk.*

When men are called upon to decide what measure of inconvenience or expense is reasonable to remove a danger, they must take into consideration the imminence and seri-

ousness of the danger involved. With the knowledge of this defendant that its employees were in the habit of crossing these "cuts" of cars, it was reasonable to anticipate, if, indeed, it was not inevitable, that some employee would lose his life, his arms or his legs in just the manner that this plaintiff lost his leg. What is the value of the limbs and lives of these railroad workers? The comparison of those values with the costs and inconvenience of a measure which, admittedly, would prevent the loss, it is respectfully submitted, is a jury question, and its judgment should be final. If the defendant considered the construction of an overhead foot path a prohibitive burden, it was incumbent upon the defendant to offer the proof thereof. *No evidence whatever appears upon this subject in this record.*

This court is invited to read the opinion of the Court of Appeals in this case, bearing in mind what has been here said. The court was dealing with a jury verdict and had before it the opinion of the Trial Judge, who heard and saw the witnesses sustaining this verdict. In its opinion, the Trial Court placed great weight upon the "practice" of employees to cross slowly moving trains at this point and upon the *fact* that "such practice was known to the defendant." The Trial Court held that the jury had the right to find that the defendant was negligent in failing to take effective action to eliminate this "practice". Yet, when the Appellate Court wrote its opinion, never once did it show sufficient concern for the verdict of the jury or the opinion of the Trial Judge to even so much as refer to the right of the jury or the Trial Court to infer negligence from this important evidence. We are left to wonder why.

The facts in this case are so close to those in the case of *Wilkerson* v. *McCarthy* that we wish to point out the analogy.

In *Wilkerson* v. *McCarthy,* 336 U. S. 453, 93 L. Ed. 497,

69 S. Ct. 413, there was a greasy board across a pit. Here there was a long cut of slowly moving cars. In that case, the man had a few feet to walk around the danger. Here, he could only wait. In that case, a safety chain had been erected. Here, no precaution whatever was taken. In that case, the defendant had failed to forbid its employees to cross the board. Here, the defendant also failed to forbid its employees to cross these slowly moving trains. In that case, it was shown by other employees that there was a "practice" among employees to cross on the greasy board, but the knowledge of the defendant of the practice was "constructive" only. Here, the chief officer of the company at these yards, its yard master, had, by his own statement, full and complete knowledge of the habit of employees to cross these cars. In that case, before the chains were installed the board was in general use for crossing the pit and hence there was practically an invitation. Here, employees were not only invited, but it was their duty to use this obstructed and dangerous walk-way.

The two cases, it is submitted, cannot be distinguished on the facts as the Circuit Court attempted, in its opinion. The knowledge of the defendant in this case, as in *Wilkerson* v. *McCarthy,* made a jury issue upon the "adequacy" of the walk-way and the failure to take measures commensurate with danger which was known to exist.

The Circuit Court of Appeals did not apply the evidence under the court's instructions to the jury in order to determine whether the evidence supports the verdict. The instruction of the court to the jury is binding for purposes of appeal because no exception was taken thereto. The court told the jury that the defendant owed the duty (1) to provide its employees a safe passageway over its premises to and from the place of work, (2) not to subject them to extrahazardous conditions and dangers, (3) to take all rea-

sonable precautions not to unnecessarily expose plaintiff to danger, and (4) to exercise care commensurate with the danger existing at the place and (5) to promulgate and enforce reasonable rules for the safety of the plaintiff and other employees.

In its opinion, the Circuit Court says *contrary* to the law as set forth in this charge (R. p. 137, 3rd paragraph): "At no other place in the yard was it negligent for the railroad to obstruct plaintiff's way with moving cars, or to fail to provide a bridge over the tracks. It cannot be said that a different standard of maintenance was required to protect plaintiff at that point where he entered upon or left his duties." We do not think that the foregoing contains a single correct statement of law. Whether it is negligence to obstruct a track would, of course, depend upon the circumstances. Certainly, obstructing a much used walk-way, where men are known to be in the habit of crossing moving trains, may be negligence. In any event, the Trial Court left that issue to the jury under a charge to which there was no exception. The Court of Appeals had no right to apply a different principle and standard in reviewing the evidence. What the court is saying in its opinion is that legal standards by which this evidence was submitted to the jury were wrong. But no exception was taken to them and they are therefore the standards by which this evidence must be measured on appeal regardless of whether, in the opinion of the Appellate Court, they are wrong or not. *U. S.* v. *Atkinson*, 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555.

There runs, through the entire opinion of the Circuit Court, language which applies to this case the idea of assumption of risk (R. p. 137).

> "The chances of injury to plaintiff, however, were no greater than those inherent in his type of employment. * * *. The danger was no greater at this point and plaintiff, as a brakeman, knew how to avoid

whatever danger that existed. It would have been unreasonable to expect the railroad to take those extreme measures necessary to remove this slight danger. (Sounds like a jury speaking.) The railroad's duty did extend to the removal of all dangers reasonably to be anticipated as an incident of plaintiff's employment but this duty was fulfilled when the railroad had defined the dangers to plaintiff and instructed him how to avoid them." (No instruction to plaintiff or rule of the company ever dealt with this crossing so far as the record shows.) (All matter in parentheses added.)

At R. p. 138—

"* * *. He was accustomed to railroad yards and presumably understood them; he knew the dangers and how to avoid them. He had been instructed to regard safety as a first consideration. (This refers to a general rule in the company's rule book.) Yet in spite of his intelligence and knowledge, plaintiff did something which every instinct of safety and instruction of caution forbid." (Matter in parentheses added.)

All this language of the opinion might apply to contributory negligence, but it has nothing to do with the matter of primary negligence as defined in the instruction of the court to the jury. Primary negligence is to be determined on the basis of the knowledge, intelligence, experience and understanding of this *railroad* as to the conditions its employees were required to work under. The defendant's knowledge and experience may be important when we discuss contributory negligence, but that is not a bar.

The Court of Appeals suggests, in its opinion, that the plaintiff was required to introduce the opinion testimony of experts on railroad construction and custom in order to establish negligence for failure of the defendant in relation to this walk-way. This court has rejected custom as

the final criteria of negligence. (See *Urie* v. *Thompson*, 337 U. S. 163, 93 L. Ed. 1287). Custom can be said to exist only as to practices and conditions which are common to most railroads. It is not to be supposed in the absence of proof that conditions similar to those existing in this case in relation to this walk-way are common to most, or, indeed, to any railroad. There was no such proof and, therefore, there is no basis for the assumption by the Circuit Court that a custom exists as to these peculiar circumstances. On the other hand, the facts in this record are such that men of ordinary experience, intelligence and education could understand them, and there was no practical need for expert testimony, and certainly no principle of law which requires that expert opinion be offered in order that the jury could draw proper inferences from facts which are easily understood.

This comment by the court below, requiring expert testimony, would not be mentioned here except that such a conception of evidence, if extended, would circumvent the clearly announced holdings of this court that juries are the final arbiters of the factual issues and inferences which should be drawn therefrom in these cases. Whether expert opinion evidence is helpful and therefore properly admissible is one thing, but to say that such evidence is *essential* in a case of this kind is an entirely different thing. Such holdings will result in these cases being tried not by juries, but by experts, a contest in which defendant railroads would probably excel.

It is therefore respectfully submitted that the facts established, especially the defendant's affirmative knowledge of the habit of its employees and its failure to take any precautions to prevent injury, bring this case directly under the holdings of this court in *Wilkerson* v. *McCarthy*, *supra*. The decision of the Court of Appeals is plainly

wrong and fails to give effect to numerous decisions of this court.

d. *Negligence With Respect to the Condition of the Brake Step of the Gondola Car:*

The plaintiff testified (R. p. 74) that—

> "* * * when I decided to step up on the train there was a flat car following a gondola, and I stepped up on the South end of this gondola on the end of the platform about, I reckon, as far as your two hands, and I undertook to step from that little platform over on this flat car which was very easy for me to do. * * * and when I went to make the step something held this left leg fast. I didn't see anything unusual when I stepped up there so I do not know what caught my breeches leg but I know my left leg did not turn loose from this part of the platform so I went down head first right between the wheels * * *" (See also R. p. 75, 79 & 80).

The witness, Henry H. Duke offered by the defendant, was the only witness other than the plaintiff who testified on this subject. On direct examination (R. p. 109 & 110) he testified as follows:

> Q. "Could you tell what caused him to fall or to lose his footing?
>
> A. Well, it appeared to me from the angle I was standing that he stepped with his right foot, and his heel or some part had caught in his overalls leg or his pants leg. I don't remember whether he was wearing overalls or not, and his foot seemed to have hung up there.
>
> By the Court:
>
> Q. Which foot do you have reference to?
>
> A. His left foot.

On Cross Examination he testified as follows (R. p. 110):

> Q. From what you saw it appeared to you that

something was holding his left leg fast on the end of that gondola car?

A. Yes, sir.

Q. Something was holding him?

A. Yes.

Q. And you concluded that it was his trousers leg?

A. It appeared that his heel was caught in his own trousers.

Q. It might have been caught in something else?

A. Might have been caught in something else. As I said, that is the way it appeared to me.

Q. You don't know what held it but you know it was held there?

A. Yes.

The plaintiff's witness and car inspector, Claude C. Wallace, described this brake step (R. p. 111) and stated that the brake step was put there for the purpose of the brakeman or conductor or whoever gets up there to tie the hand brake. The step was described by him as being eleven (11) inches in width. The inspection report made by this witness of the inspection of cars designated by E. H. Stancil, after the injury, is found in the Reporter's Transcript, p. 243. This inspection report does not show that any inspection was made of the brake step although the report states that all safety appliances were in good condition, and no defects were found in either of the cars. The witness could not state whether or not the cars comprising this "cut" of cars or any of them had been inspected previous to the inspection made after the accident (R. p. 112 & 113).

There is a conflict in the evidence as to whether the car on which the plaintiff was injured was the same car which was inspected after the accident. The plaintiff testified (R. p. 79 and R. p. 83) that he was injured on a Pennsylvania gondola which was "red" and had the word *Pennsylvania* written across it. Stancil, the yard master had

a New York Central gondola inspected after the accident (R. p. 85, 107 & 108), which car was black. The jury had the right to reject Stancil's testimony and to find that the defendant was injured on a Pennsylvania car which was never inspected, either before or after the injury.

The defendant owed the duty to inspect these cars. In 35 Am. Jur., Sec. 227, p. 659, the following statement is made:

> "In respect of foreign cars that are received for transportation over its road a railroad company owes to its employees a duty of inspection for the purpose of determining whether they may be safely used."

This court has held in the cases of *Jesionowski* v. *Boston and Maine RR,* 329, U. S. 452, 91 L. Ed. 416, and in *Johnson* v. *United States,* 333 U. S. 46, 68 S. Ct. 391, 91 L. Ed. 468, that where the facts of an occurrence warrant the inference of negligence, a jury issue has been made. In the case of *Johnson* v. *United States,* 333 U. S., p. 49,—

> "No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inference from unexplained events."

Under almost identical facts with those established in this case, the court applied the doctrine in *Burch* v. *Atcheson T. & S. Railway Co.,* 142 P., 2nd 955, 61 Cal. App. 2nd 286

The testimony in this case of the witness, Duke, in the light of the verdict of the jury should be construed as strong corroboration of the plaintiff's statement that his left foot was held fast to the brake step by some object thereon. The jury would not have been justified in accepting the explanation offered by the witness Duke, that the plaintiff got his heel caught in his own trouser leg. The reason for this is that even though one might step with one's heel upon one's trouser leg, this could not possibly result in

holding the foot and leg fast to the brake step. Duke affirmatively testified that in some way the plaintiff's leg was held fast to the brake step. In any event, the jury were the arbiters of any conflict in the statement of Duke and the statement of the plaintiff.

The complaint in this case charged (R. p. 10) "that whatever object or thing caught his trousers leg, as aforesaid, was wrongfully and negligently suffered, permitted, or placed upon the North end of the said gondola car by the defendant, or one of its agents or employees." The defendant provided this brake step for its employees to stand upon. If an object was permitted upon the said step, which would catch the trouser leg of employees standing thereon, then it would seem to be apparent that the defendant would be guilty of negligence in permitting such an object to be upon the brake step. If the jury believed the testimony of Craven in this respect, then it follows that they were justified in drawing the inference that some object or condition existed upon this brake step which should not have been there. The failure of the defendant to show any inspection of this car previous to the injury adds great weight to this inference. In addition, although an inspection of *a* car was made after the accident, the evidence does not show that this brake step was inspected even then. There is no evidence therefore rebutting the inference from the plaintiff's testimony that something on this brake step caught his trouser leg and held it fast. Negligence in this respect is, therefore, fully supported by the evidence.

e. *Negligence With Respect to the Conditions Under Which the Plaintiff Was Required to Make His Time Report:*

In Volume 43, LRA, 305, is found an exhaustive annotation upon the subject of the duty of the employer to pro-

mulgate and enforce rules to govern the work of employees. At p. 313, the following statement is supported by numerous collected cases:

> "It is sufficiently obvious that an employer cannot be said to have discharged his duty in regard to the framing of rules unless their provisions are sufficiently specific to furnish the employees affected with adequate information respecting the acts which are to be done in order to carry out the employer's ideas as to the proper manner of performing the work."

The plaintiff submits that the evidence supported a charge of negligence against the defendant for failure to specify by rule or instruction the time and place for the brakemen to make, and the conductors to receive the time report. The defendant's instruction to conductors (Plaintiff's Exhibit No. 1) required them to get in the time report "as quickly as possible after completion of a trip." All conductors received this instruction. There was no uniform practice. Some waited until the return trip (R. p. 57 & 58). Some took it wherever they saw the brakeman. Some waited at the wash room and took it immediately after the trip (R. p. 60 & 61). Sargent, the conductor under whom Craven was working, took these reports about one half the time at the "CO Office" and about one half the time along the street opposite the "CO Office" (R. p. 65).

The plaintiff testified (R. p. 71) that he understood it to be his duty to return his time report as soon as possible after completing the trip; that he had seen such instructions on the Bulletin Board, and had been so instructed by his conductor. (As to the use of the Bulletin Board for such purposes, see R. p. 91). Craven specifically stated (R. p. 79) that Sargent had asked him to get in his time report immediately after each run. Sargent denied that he so instructed Craven (R. p. 65). The plaintiff testified: (R. p. 84).

> "* * *. I think if I had some rule I wouldn't have been confused in running around and looking for these conductors to give them my time which I thought I was supposed to do."

The defendant contended that there was no duty upon the plaintiff "to report at once" but that he should have followed his normal course and reported when he met the conductor for the return trip. Not admitting, but assuming this contention to be correct, then the jury had the right to find the defendant guilty of negligence in failing to so instruct the plaintiff or that the defendant was negligent in posting instructions on the Bulletin Board to the contrary or that Sargent had been negligent (if the jury accepted the plaintiff's testimony) in instructing the plaintiff to the contrary.

The jury had the right to believe that great confusion existed between the conductors and brakemen as to when and where these reports should be made, and that the defendant owed the duty to promulgate, publish and enforce a rule specifying the time and place at which the report was to be made and received by both the conductor and the brakeman.

The failure of the defendant in this respect resulted in the plaintiff's passing back and forth across this dangerous walk-way and exposing himself unnecessarily to peril and hazard. Under the opinion of the court in *Blair* v. *B. & O. R. Co.*, 323 U. S. 600, 89 L. Ed. 1166, 62 S. Ct. 854, the negligence of the employer is to be determined by viewing its conduct as a whole and especially is this true where the several acts of negligence "impart character to each other." Having negligently provided a dangerous walk-way, the defendant negligently required the plaintiff to use it when it would not have been necessary for him to do so had the defendant performed its duty with respect to giv-

ing specific instructions designating the time and place for making time reports.

f. *Contributory Negligence and Causal Connection:*

The Circuit Court, in its opinion, seems to have held that the defendant was guilty of contributory negligence as a matter of law, and that such negligence was the sole cause of his injury. We shall not prolong this discussion in order to demonstrate that the jury had a right to find the defendant not guilty of contributory negligence because it is to be presumed that the jury has made a correct appraisal of the facts and if the court is of the opinion, in viewing the evidence, that the plaintiff was guilty of contributory negligence as a matter of law, then the amount of the verdict clearly shows that the jury so found, and it can not be assumed that they did not so find in accordance with whatever view the reviewing court may take on this question.

The important and fatal error of the Circuit Court was in holding that the assumed negligence of the plaintiff was the sole cause of his injury, and that the injury was not caused "in part" by the negligence of the defendant.

In the American Law Institute's Restatement of the Law of Torts, the authors lay down the following proposition, Section 431, p. 1159:

> "The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm"

The authors recognize what is designated as an "intervening force." It would seem that it is upon this theory that the court relieves the defendant of its liability. They

say, in effect, that the act of the plaintiff in attempting to cross a moving "cut" of cars is such an "intervening force" that it became the sole cause of the plaintiff's injury and the defendant's negligence, if any, did not "cause, in whole, or in part," such injury. That such is not the situation in this case is shown by the following rule found in the Restatement of the Law of Torts, Section 443:

> "An intervening act of a human being or animal which is a normal response to the stimulus of a situation created by the actor's negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about."

The negligent conduct of the defendant in requiring the plaintiff to use a walk-way continuously obstructed for long periods of time was the stimulating cause for the plaintiff doing the very act which is charged as being the sole cause of his injury. It is clear that this position is not sound. The negligent act of the plaintiff was caused, at least in part, by the original negligent conduct of the defendant. The plaintiff was induced to take the risk by the negligent acts of the defendant itself. Conduct so induced is not an "intervening force."

In the case of the *UPR Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751. Opinion by Mr. Justice Holmes, a brakeman was killed when a following train ran into the rear of a negligently stopped preceding train. The brakeman who was killed had failed to go back and warn the following train and remained in the caboose. The court said:

> "But it is said that, in any view of the defendant's conduct, the only proximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another when, if it had done its duty, neither train would have been at that place. Its conduct was as near to the re-

sult as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road."

Thes court has said in *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 93 L. Ed. 208:

"The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained. 45 USCA Sec. 51, 10A FCA title 45, Sec. 51. And to make its purpose crystal clear, Congress has also provided that 'no such employee . . . shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the . . . death of such employee.'"

In the case of *Carter* v. *Atlanta & S. A. B. R. Co.*, 94 L. Ed. 183, 338 U. S. 430, 70 S. Ct. 228, the court reaffirmed its prior holdings and says that if a jury determines that the defendant's negligence is "a contributory proximate cause of injury," its verdict should be sustained.

(See also *Tennant* v. *Peoria & PUR Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409; *Lily* v. *Thompson*, 332 U. S. 459, 92 L. Ed. 73, 68 S. Ct. 147).

We do not need, however, to strain any ordinary concepts of proximate cause in this case. If the injury was the natural and probable consequence of a wrongful act and could have been reasonably foreseen and anticipated as the

probable result of such act, then the law has always said that the injury is proximately caused by the wrongful act. Under the facts of this case, the defendant admitted that it knew that its employees were crossing slowly moving "cuts" of cars. It is respectfully submitted that, with this knowledge, the jury could find that injury was the natural and foreseeable consequence of the failure of the defendant to take any steps to eliminate such conduct.

VII

Conclusion

In conclusion, counsel for petitioner, respectfully submits that for the reasons herein set forth, a writ of certiorari should be granted the petitioner and that this Court should review and reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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